



REPUBLIC OF KENYA
INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 587 OF 2014

BETWEEN

JENERI LENGUANA CLAIMANT

VERSUS

SEVERIN SEA LODGE [E.A] LTD..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Mokaya Advocate instructed by Munyiithya, Mutugi, Umara & Muzna Company Advocates for the Claimants

Ms. Kodjo Advocate instructed by Sichangi Partners, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 20th November 2014. He states he was employed by the Respondent as a Security Guard on 2nd January 2007. The Respondent terminated his contract on 28th March 2014. He states termination was unfair and unlawful, and seeks the following orders against the Respondent:-

- a) Payment of salary arrears at.....Kshs. 232,546
- b) Arrears of house allowance at.....Kshs. 429,330
- c) Service charge.....Kshs. 377,567
- d) Overtime (4 hours).....Kshs. 74,880
- e) Unpaid off 2½ days in a nightKshs. 15,000
- f) Extra hours when working at night.....Kshs 18,282
- g) Night allowancesKshs. 165,000

- h) Special duty to Jahazi.....Kshs. 14,000
- i) Public Holidays in 2½ yearsKshs 34,584
- j) Leave allowanceKshs. 180,000
- k) Notice basic house allowanceKshs. 19,515
- l) Notice basic salaryKshs.57,762
- m) 12 months' salary in compensation for wrongful termination atKshs. 231,048
- Total.....**Kshs. 1,915,645**
- n) Costs
- o) Interest
- p) Any other suitable order

2. The Respondent filed its Statement of Reply on 22nd January 2015. Its position is that the Claimant was employed by the Respondent from January 2010, under separate casual contracts. From December 2010, he was engaged on various seasonal contracts. When not on a seasonal contract, he worked on casual engagement. The Respondent did not terminate Claimant's last contract; the Claimant sought leave to travel home, and never presented himself for consideration of a further contract. He is not entitled to any of the prayers. The Respondent asks the Court to dismiss the Claim, with costs to the Respondent.

3. The Claimant testified, and closed his case, on 12th July 2016. Respondent's Senior Personnel Clerk gave evidence on the same date, and on 13th October 2016, when hearing closed.

4. The dispute was last mentioned in Court on 18th November 2016, when Parties confirmed filing of their Submissions, and Judgment reserved for delivery.

Claimant's Case:-

5. The Claimant told the Court he hails from Maralal. He was employed by the Respondent as a Security Guard, under various fixed term contracts, exhibited before the Court. He was first employed in the year 2007.

6. He was asked to go home on 28th March 2014. He would be recalled after 1 week. He called a colleague after 1 week. He asked him if his name had been included in the Duty Rota. It was not.

7. He approached the Chief Security Officer. He was referred to the Human Resource Officer who advised him there was no more work for him. He was not issued with a letter of termination.

8. He never went on annual leave. Leave traveling allowance was Kshs. 4,400. He was entitled to shoe allowance of Kshs. 7,000 per year. He served at Jahazi, an outlet of the Respondent.

9. He was entitled to travel and subsistence allowances. He merited night allowance. He worked excess hours without compensation.

10. Cross-examined, he testified he did not apply for work in the year 2010. He paid trade union dues to his Union. He was issued with Security Boots once. His name appeared on the Security Boots Schedule for March 2011, and May 2011. He signed leave Passes for 2011 and 2012. He was asked by the Chief Security Officer to apply for work in the year 2010. He was already working, at the time Chief Security

Officer asked him to apply for work, he told the Court on redirection. The Leave Passes were not shown to have been approved by the Management. He prays the Court to allow the Claim.

Respondent's Case:-

11. Senior Personnel Clerk, Mwandonga Yawa, told the Court the Claimant was employed by the Respondent between 2010 and 2014, upon his application to work as Security Guard.

12. He worked on casual terms and seasonal contracts alternately. He was paid in accordance with the wage guidelines. His name was listed as number 52 on the Weekly Casual Register. He was paid Kshs. 786 per day, which included overtime.

13. He went on annual leave as shown in the Leave Passes.

14. He was entitled to, and was paid night allowance, overtime and travelling allowance, in accordance with KUDHEIHA CBA. These were paid during casual engagement, as well as seasonal engagement.

15. Service charge was paid to Employees who subscribed to the Union. The Claimant was paid as shown in his pay slips.

16. He was issued uniform and boots, as shown in the Schedules of 2011, 2012 and 2013.

17. The Claimant was in the habit of going away from work, and returning to work irregularly. He asked for days off to travel home. He was granted days off and never returned. The Respondent did not terminate his contract.

18. On cross-examination, Yawa testified he served as Senior Personnel Clerk. When the Claimant worked and left, there was a Human Resource Manager. Ms. Kurji was the Human Resource Manager.

19. Yawa testified based on Claimant's personnel file.

20. The Respondent tried to reach the Claimant after he deserted, through his Co-Employees. There was no written document enquiring on his whereabouts. He was both Casual and Seasonal Employee.

21. He received pay slips while on contract. Union dues were remitted, so long as the Claimant was a Member of the Union.

22. He took 1 day of annual leave in 2012. Leave Passes were computer - generated and signed by all concerned Parties. In 2011, he took 19 days of annual leave. The Witness did not know if Leave Passes for 2013 and 2014 were availed to the Court.

23. The daily wage included overtime. There were many months when the Claimant was out of work.

24. Yawa closed his evidence with the explanation that Ms. Kurji no longer works, and Yawa took over her responsibilities. He presented to the Court Claimant's employment records, in their original form. Claimant did not have a phone and could not be contacted directly by the Respondent upon desertion. The Respondent prays for dismissal of the Claim.

The Court Finds:-

25. The Court believes the evidence of the Claimant on the date of employment. He was initially employed on casual engagement in the year 2007.

26. He was asked to write the job application dated 21st January 2010 by the Respondent, while still known by, and having worked in the past for, the Respondent.

27. His job application reads he had as of the date of application, worked for Jahazi Marine for more than 5 years.
28. Jahazi Marine was explained to be an outlet of the Respondent.
29. The Court is convinced the Claimant worked from 2007 for Respondent, up to 2014. He was on casual and seasonal engagement.
30. His engagement was in continuity. While not under seasonal contracts, he continued to work on casual terms. He merited conversion to regular employment under Section 37 of the Employment Act. Notwithstanding any provisions under the Employment Act, the Court, under Section 37(4) of the Act, is empowered to declare an Employee to be employed on terms and conditions of service consistent with the Act.
31. It was the practice of the Respondent to renew Claimant's engagement. Renewal was frequent. The Claimant served as a Security Guard in continuity. ***It is declared he was employed on regular terms.***
32. Prayers (a) to (l) of the Claim detailed at paragraph 1 of this Judgment were not supported by sufficient evidence. In his list of Documents, the Claimant filed schedules detailing his prayers. These schedules were characterized as supportive documents. They are of no probative value, drawn as they are by the Claimant himself. They can only serve as part of his bare Pleadings, not documents establishing the various claims.
33. Besides, most of these prayers were discounted by the evidence of the Respondent. Leave Passes show the Claimant went on leave for a certain period which he opted not to disclose to the Court. Payment Vouchers show he was paid annual leave pay. Pay slips show service charge, night and house allowances were routinely included in Claimant's monthly dues. There are Schedules provided by the Respondent showing the Claimant received Security Boots.
34. The Claimant's pay slip show he was subscribed to KUDHEIHA. The seasonal contracts referred to CBA concluded between the Employer and KUDHEIHA. It cannot be denied that he was a Member of KUDHEIHA and covered under the CBA. The Claimant did not bring his prayers within the terms and conditions of employment contained in the CBA. He merely submitted he is entitled to this and that, without directing the mind of the Court to any clause in the CBA.
35. The figures claimed seem to the Court bloated, and in the end obscure what little merit there could be, in the overall Claim.
36. The prayers for overtime; unpaid 2½ days in a night; extra hours when working at night; travelling allowances; and special duty at Jahazi, were all inelegantly pleaded, and not brought within any clause in the CBA.
37. Notice pay is split and pleaded based on 'basic house allowance' and 'notice basic salary.' What is meant by these terms?
38. The Claimant stated, and the Court accepts his statement, that he was asked to go home, and would be recalled. This was on 28th March 2014. He obliged and went home. He was not recalled. He returned on his own initiative and was told by the Human Resource Manager there was no work.
39. The Respondent's version is that the Claimant sought leave to travel home. He was in the habit of going away from work irregularly and returning to work at his own pace. On this occasion he did not return. The Respondent attempted to reach him through Co-Employees as he did not have a phone. There was no written communication to the Claimant.
40. The evidence of the Claimant on the circumstances of separation, is more persuasive. The Respondent seems not to have wanted to engage the Claimant further, and instead of formally ending the

7 year employment relationship, opted to lie to the Claimant, asking him to leave for Maralal, and would be recalled.

41. Termination was instigated by the Respondent. It was unfair, it was not based on valid ground under Section 43 and 45 of the Employment Act, and on fair procedure, under Section 41 and 45 of the Employment Act.

42. His last gross monthly salary was Kshs. 25,759. ***He is granted the equivalent of 10 months' gross salary in compensation for unfair termination, at Kshs. 257,590.***

43. Notice pay under Section 36 of the Employment Act 2007 is based on remuneration the other Party would have earned. 'Remuneration' under Section 2 of the Act, means total value of all payments. Notice pay is therefore based on gross pay under the law. ***The Claimant is granted 1 month gross salary at Kshs. 25,759 in lieu of notice.***

44. The prayer for public holiday pay is upheld. There was no indication in the pay slips, that public holiday pay was ever made available to the Claimant. The Leave Passes confirm the Claimant served on public holidays, but no evidence was shown that he received compensation on any one occasion. ***The prayer for public holiday pay, at Kshs. 34,584 is allowed.***

45. No order on the costs and interest.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant the equivalent of 10 months' salary in compensation at Kshs. 257,590; 1 month gross salary in lieu of notice at Kshs. 25,759; and public holidays' pay at Kshs. 34,584 – total Kshs. 317,933.

c) No order on the costs and interest.

d) Other prayers have no merit, and are rejected.

Dated and delivered at Nairobi this 31st day of March 2017.

James Rika

Judge